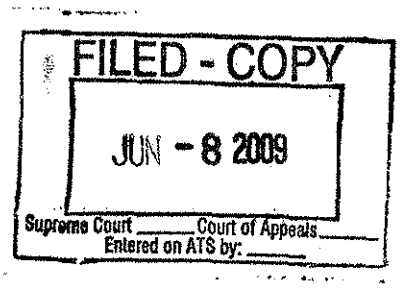
6-8-2009

Northwest Pipeline Corp. v. Luna Appellant's Reply Brief Dckt. 35469

IN THE SUPREME COURT OF THE STATE OF IDAHO

NORTHWEST PIPELINE CORPORATION, a Delaware corporation,	)	**SUPREME COURT NO. 35469**
Plaintiff-Respondent,	)	
vs.	)	
JOSE LUNA and ROSANNA LUNA, and their marital community and STEVEN CHURCH and ELIZABETH CHURCH, and their marital community,	)	
Defendants-Appellants.	)	



APPELLANTS' REPLY BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Kootenai

Honorable Lansing L. Haynes, presiding

Susan P. Weeks
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
(208) 667-0685/(208) 664-1684 FAX

Attorneys for Defendants-Appellants

Todd Reuter
Preston Gates & Ellis, LLP
1200 Ironwood Dr., Suite 315
Coeur d'Alene, ID 83814
(208) 667-1839/(208) 765-2494 FAX

Attorneys for Plaintiff-Respondent

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I INTRODUCTION

In its statement of the case and introduction to its arguments on appeal, Northwest emphasizes that it brought the present suit to clear encroachments on the Church and Luna properties which it claimed impeded its ability to inspect its pipeline and make necessary repairs in a timely and safe manner. Northwest contends removal of these encroachments are required for safe operation of its high-pressure transmission pipeline. Northwest also discussed in its response on appeal, the width it required for excavation of its pipeline. Northwest conceded that the future installation of a loop line was discussed at trial (and argued extensively in its briefing before the trial court). However, Northwest but contended that this issue was irrelevant on appeal because the trial court's decision can be affirmed on other grounds specifically regarding the right of way width needed for current inspection, maintenance and excavation needs.

II. ARGUMENT

A. The Trial Court Considered Future Right of Way Needs for Additional Lines in its Decisions

Northwest has chosen to restate the issues on appeal. Apparently, this was done in large part to divert this Court away from the fact that the trial court allowed and utilized testimony concerning the easement width needed by Northwest to accommodate a future (loop) line. Northwest claims that Church and Luna have mislead this Court on appeal by discussion of this error. Northwest maintains that the trial court entered dispositive findings demonstrating that the trial court limited its decision on the operation and maintenance needs of Northwest to the existing pipeline. Northwest directs this Court to Findings Nos. 13, 15 and 16 to the exclusion of all others in support of this position.

In this case, Northwest claimed that the alleged encroachments interfered with its ability to install additional lines. R 014. In its findings of fact, the trial court indicated that the original

intent of the parties was to establish an easement wide enough for Northwest to "construct, maintain, inspect, operate, protect, repair, replace, later or remove a pipeline or pipelines ... together with the right of ingress and egress." R 417. The trial court also found that the excavation and safe installation of a future pipeline entitled Northwest to a 20 foot easement on Luna's and Church's parcels. R 569-570. Because the trial court took into consideration the future needs of the Northwest Pipeline for right of way in its determination of the width issue, and the extinguishment of easement issue, Luna and Church requested a reconsideration of the matter by the trial court. In response to the motion, the trial court indicated that since Northwest's easement was created, but no occasion had arisen for its use for maintenance purposes, any use of the right of way by the servient estate was not adverse. R 571-573.

However, Northwest's need to inspect, maintain and repair its pipeline arose when it constructed and installed the pipeline. It relates to the same time period. There are only two logical explanations for a finding that no occasion had arisen for its use. First, the trial court was considering that the need for the additional right of way would not be triggered until it decided to install the future pipeline. The other logical explanation was that the Pipeline Safety Act created the need to perform inspections and maintenance of the pipeline and Northwest would need the additional right of way for that purpose.

As to the precise findings cited by Defendant, Finding No. 15 merely indicates that the encroachments unreasonably interfere with Northwest's rights. It doesn't delineate whether those are for the present line or the future line. The remaining findings cited will be addressed in the subsequent sections of argument as they pertain to the scope of the easement width and the encroachments.

B. Federal Regulations do not Define the Scope of the Easement

In its response, Northwest emphasizes on more than one occasion that its operation is regulated by the federal government. Northwest contends recent legislation in the early 2000's *increased* its obligation to test and maintain its pipeline. Northwest indicates these heightened obligations required internal assessment of its pipelines to ensure structural integrity of the line from the inside out. Northwest infers this regulation caused it to need to use more width across Church's and Luna's properties.

One of the fundamental issues involved in this case is Northwest's claim that the removal of encroachments in its right of way width and definition of its right of way width are requirements imposed by new regulations promulgated under the Pipeline Safety Improvements Act, 49 U.S.C. § 601, and therefore there was no need to address removal of the encroachments until passage of the Act. Northwest advances this argument because many of the encroachments which are claimed to unreasonably interfere with its inspection, maintenance and excavation of its pipeline have existed for a long period of time, some over the objection of Northwest, and others in contradiction of Northwest's own policies. Without this fiction of a subsequent trigger date related to regulatory requirements, Northwest must then address the issue of extinguishment of its easement.

Northwest argued below, and maintains on appeal, the Pipeline Safety Act required two things: increased pipeline testing and development of a pipeline integrity management plan. Northwest then argues that this resulted in a new need to remove encroachments from the pipeline right of way. However, as it did below, Northwest never explains supplements its arguments. It provides no direct citation to specific references in the Act in support of its argument. It merely invokes the name of the Act as though that is enough to explain the merits of its position.

Northwest also claims it will be subject to penalties because of the encroachments. Northwest cites to the general penalty provisions of 15 U.S.C. § 717t and 7175t-1, and 49 U.S.C. §§ 60122 and 60123in support of its claim without further explanation. Northwest did not argue any aspect of the Natural Gas Act, 15 U.S.C. § 15 *et seq,* to the trial court. The Natural Gas Act regulates interstate gas rates and charges. The only provision that pertains to construction and operation of gas line is 15 U.S.C. § 717f, which grants the right of eminent domain to a gas company if it has obtained a certificate of public convenience and necessity for pipeline construction.

Northwest argues it is hindered in its ability to develop an emergency plan as required by the Pipeline Safety Act and regulations promulgated at 49 C.F.R. 192.615. It claims it may be fined due to its inability to develop an integrity management plan. Northwest concludes the proximity of the structures might result in an inefficient response in an emergency. Rather than citing to facts in the record to support this position, Northwest cites to in *Swango Homes, Inc. v. Columbia Gas Transmission Corp,* 806 F.Supp 180 (S.D. Ohio 1992) as though facts in another unrelated case establish facts in the record on this appeal. Nothing in the record supports this position. In fact, as discussed below, Northwest had an integrity management plan in place at the time of trial.

At trial, when questioned about the relationship between its claims and the Act, Northwest's explanation was that the Act mandated Northwest to establish an integrity management plan to assess the integrity of its pipeline by direct assessment of the line, hydrostatic testing of its line, in-line inspection of the line, or any combination thereof. Tr Vol. I, p. 52, L. 23-25; p. 1-4. However, Northwest acknowledged it has always had integrity management plans. Tr Vol. I, p. 52, L. 23-25; p. 1-4.

Before the Act, Northwest was mostly doing outside testing. Tr Vol. I, p. 54, L. 20-25; p. 55, L. 1-9. Direct assessment involved looking at the outside condition of a pipeline and required excavation. Tr Vol. I, p. 53, L. 6-18. Hydrostatic testing involved running water through a segment of pipeline at a specified pressure for eight hours and required excavation of the pipeline. Tr Vol. I, p. 53, L. 19-25; p. 54, L. 1-6. In-line inspection required placing "smart pigs" in the gas stream to detect dents, cracks, corrosion. Tr Vol. I, p. 54, L. 7-16. The only difference in testing after the Act was that in-line testing was required. Tr Vol. I, p. 194, L. 10-19.

Instead of providing facts on appeal that support its position that the Act required the right of way to be free of encroachments, Northwest emphasizes on appeal the above tests that it performed on its pipeline to ensure pipeline integrity and the purposes for the maintenance, testing and inspection. It described in detail for this Court direct assessments, consisting of leak surveys, coating surveys, aerial surveys, and other land surveys which it does to maintain the integrity of the pipeline. Northwest discusses hydrostatic testing and in-line inspection of the pipeline. It also discusses the cathodic protection which prevents corrosion to the line which it utilizes for pipeline protection. [Response brief pp. 5-6.]

Churches and Lunas have never disputed that Northwest does inspection, maintenances and repair to the pipeline. On appeal, Northwest ignores Church and Lunas contention that the trial testimony established that passage of the Act did not cause any greater or new need for a right of way width free of encroachments.

Northwest relies upon the holding in *Swango Homes, Inc. v. Columbia Gas Transmission Corp,* 806 F.Supp 180 (S.D. Ohio 1992) for the proposition that an easement which grants the right to operate a natural gas pipeline must, if the easement is not to be wholly illusory, imply the

right to operate the pipeline in accordance with applicable federal laws and regulations. Northwest then provides a list of acts which control its operation and cites to its own internal policies and procedures as controlling its needs and requirements. (Outside the Pipeline Safety Improvement Act, these acts were not raised before the trial court.)

Northwest argues that to be in compliance with these regulations, it needs twenty feet of right of way on each side of its line. Rather than providing substantive facts from the record. Northwest references *Andrews v. Columbia Gas,* 544 F.3d 618 (6th Cir. 2008) and *Columbia Gas Transmission Corp v Davis,* 33 F.Supp.2d 640 (S.D. Ohio 1988) for the proposition that "[al]lmost every court to construe an easement with similar language as the one at issue here has concluded that a twenty-five foot right of way on both sides of the pipeline was reasonably necessary and convenient." However, and most importantly, the *Andrews* court noted in its decision, determining right of way width is a fact specific determination to each case.

Northwest does not address Idaho law that the use of an easement may not be enlarged to the injury of the servient estate. *Village Condominium Ass'n v. Idaho Power Co.,* 121 Idaho 986, 988, 829 P.2d 1335, 133 (1992). This holding is true even if one is a utility provider considering safety maintenance and repair matters. *Id.*

Further, Northwest studiously avoids addressing the trial testimony pertaining to the impact of federal regulation on its right of way needs. Northwest fails to address its own trial testimony that the Right of Way Reclamation Plan was developed independent of the integrity management plan developed under the Pipeline Safety Improvement Act. Tr Vol. I, p. 194, L. 10-19. It disregards its own testimony that the reclamation project was not turned in to any of its regulating agencies, including the Federal Energy Regulatory Commission (FERC) or the Department of Transportation. Tr Vol. I, p. 194, L. 16-25; p. 195, L. 1-8. Northwet does not

contradict or explain its own testimony that the relationship of the suit to the Act was "indirect" or that the encroachment removal project was really developed to get right of ways "back to where they should have been in the first place." Tr Vol. I, p. 195, L. 1-15

In sum, there is no basis in the record on appeal to find that Northwest's federal regulations entitle it to a twenty foot right of way due to the passage of the Pipeline Safety Act. Further, the trial court erred when it determined that Northwest's need was for an unimpaired twenty foot right of way.

C. Easement Width and Extinguishment

In a portion of its findings, the trial found that 20 feet on either side of the pipeline was necessary for Northwest to safely excavate the pipeline for repair and maintenance; that permanent structures located within 20 feet of the pipeline would impede Northwest's use of equipment for that purpose; that large structures or structures with concrete foundations erected within 20 feet of the pipeline would present safety risks and interfere with plaintiff's right and duty to maintain, inspect, operate, protect, repair, replace, alter or remove the pipeline; and that fence posts, tree roots and shrub roots posed safety risks to the pipeline. Northwest maintains this finding was supported by substantial and competent evidence and is not clearly erroneous.

Northwest urged throughout trial that the easement width should be based upon two factors: Northwests needs at the time of trial, and, additional needs caused by regulations with which it is required to comply. Northwest does not reconcile on appeal how this posture relates to the prior holding of this Court that the initial selection of a location fixes the location, width, course and character of the right of way. *Coulsen v. Aberdeen-Springfield Canal Co.*; 47 Idaho 619; 628-629; 77 P. 542 (1929).

In support of its position regarding the width of the easement, Northwest directs this Court to Dwain White's testimony that during installation of the pipeline in the latter part of the 1950's, the construction area was approximately 100 feet. Tr Vol. I, p. 364, L. 4-12. Northwest "balances" this perspective with the testimony of Tom Grant, District Manager, that in present times, the company would likely use a track hoe or a rubber tired backhoe to excavate the line, and that such equipment is 12 feet wide. Tr Vol. I, p. 38-39. However, Northwest conceded at trial it does not do its own excavation. It has done away with all of its equipment. It hires excavation work out to operator-qualified contractors. Tr Vol. II, p. 792, L. 11-21; p. 793, L. 10-25; 794, L. 1-22.

Northwest also directs this Court's attention on appeal to an exhibit of an excavation of the same pipeline in a nearby soccer field. Northest claims Defendant's Trial Exhibit UUU demonstrates that the width of the trench alone would require more than five feet on the Luna/Church side of the pipeline. There is no testimony as to the width of this trench from the pipeline on each side. Further, there was no testimony that this width was the minimum width needed to safely excavate and work on the pipeline.

Northwest claims on appeal that, in addition to space needed for equipment, safety concerns also necessitate space. Northwest indicates it does not allow digging within two feet of an in-service line. However, Northwest presents no evidence on appeal that a right of way width less than 20 feet on Luna's and Church's property would prohibit compliance with this regulation.

Northwest also indicates heavy equipment should not be driven over the line absent reinforcement or protection (including dirt cover over the line based on depth of the line). While this may be a requirement, it does not reflect a need for 20 feet on Church and Luna's property.

In fact, on appeal, Church and Luna presented evidence at trial that in a nearby excavation of this same line, Northwest certified operator positioned heavy equipment directly over the line during excavation. *See* Defendant's Exhibit SSS.

Northwest also noted on appeal that excavation of the pipeline should comply with OSHA requirements. While this statement is correct, Northwest provided no argument or citation to the record on how this fact supported the trial court's finding of the width of the easement.

In their initial brief, Church and Luna raised the fact that Tom Grant, District Manager for Northwest, testified that the 40 foot width was needed in large part because Northwest planned to loop a line in the future. Tr Vol. I, p. 25, L. 11-25; p. 26, L. 1-6. Out of the 40 feet, Northwest intended to use an area 15 feet wide to accommodate a future pipeline south of the existing line on Luna's and Church's property and that Northwest would be able to excavate and maintain it in the 15 feet. Tr Vol. I, p. 382, L. 4-25, 383-385; 386, L. 1-6. Northwest totally ignores this argument on appeal and does not address it.

Northwest also claims on appeal that these encroachments interfere with its ability to perform federally mandated surveys. At trial, Northwest testified it has been conducting aerial surveys since Mr. Grant joined the company in 1973. Tr Vol. I, p. 111, L. 20-25; L. p. 112, L. 1-5. Mr. Grant testified that while doing aerial surveillance, Northwest's view has never been obstructed by buildings in or near the right of way because they don't have any on the right of way. Tr Vol. I, p. 70, L. 25; p. 71, L. 1-16. Further, the pipeline has been inspected across the Church and Luna properties annually with corrosion surveys and leak surveys. Vol. I, p. 129, L. 1-8. There was no testimony that the encroachments interfered with these surveys.

Rather than address the evidence raised by Church and Luna on appeal, Northwest

chooses to attack the credibility of defendants' expert. Northwest claims the only evidence Church and Luna could muster in support of its contention regarding the necessary width required for maintenance is the testimony of Steven Church and defendants' expert, Gary Sterling. This argument ignores all of the above facts from the record.

Northwest claims defendants' expert, Mr. Sterling, testified that with unlimited time, money and equipment, Northwest could accommodate or work around the Church and Luna encroachments. There is no record cite in its brief to support this allegation. This argument grossly misstates Mr. Sterling's testimony. Further, it ignores Northwest's own testimony given at trial.

Northwest testified if a smaller excavator was used on the Church and Luna property and shuttling each individual bucket of soil out to the street would take about a third more time. Mr. Grant did acknowledge that a truck could be moved ahead of the excavator equipment which would speed up the process. Tr Vol. I, p. 127, L. 9-25.

Mr. Sterling testified that the larger pieces of equipment illustrated in Plaintiff's Exhibit 35, and the piece of equipment depicted in Defendant's Exhibit SSS, were too wide to safely excavate the pipeline on the Church and Luna property. Tr Vol. II, p. 857, L. 13-25; p 858, L. 1-25. Mr. Sterling testified Northwest's excavator could use smaller excavation equipment readily available in the market during excavation that would allow the encroachments to remain in place. Tr Vol. II, p. 833, L. 15-25, p. 834, p. 835, p. 836, L. 1-13.; 837-838; p. 839, L. 1-15; p. 840, L. 20-25; p. 841, p.842, L. 1-21. He agreed with Northwest that a larger piece of equipment with a larger bucket would accomplish the task sooner than a piece of equipment with a smaller bucket. Tr Vol. II, p. 868, L. 14-20. Mr. Sterling indicated that the fences were in the way of any excavation, and would have to be removed to excavate the pipeline. Tr Vol. II, p. 876, L. 12-16.

Mr. Sterling never indicated that Northwest would need lots of time, money and equipment to accomplish the excavation.

Northwest contends on appeal that personal beliefs and opinions about how the easement holder could work around encroachments are not part of the proper analysis for determining the scope of easement rights. This argument ignores the holding of *Mc Fadden v. Sein*; 139 Idaho 921, 924; 88 P.3d 740 2004. In *Mc Fadden*, the Court held that use of the easement includes those uses which are incidental or necessary to the reasonable and proper enjoyment of the easement, but is limited to those that burden the servient estate as little as possible. Further, Northwest's argument does not take into account the holding of *Conley v. Whittlesey*, 133 Idaho 265, 270, 985 P.2d 1127, 1132 (1999) that a grant indefinite as to width and location must impose no greater burden than is necessary.

Northwest's unfounded claim that it would take unlimited time, money and equipment must be viewed in light of the real evidence in the record. The extra time it would take to excavate the pipeline should have been weighed by the trial court against Northwest's ability to achieve the same excavation with smaller equipment. Northwest's response does not explain why use of the larger equipment poses the least amount of reasonable burden on the servient estate in the exercise of the easement. It also never presented facts at trial that any difference in time caused by the different bucket sizes would significantly increase the excavation time.

If this Court finds the larger equipment is the reasonable alternative for excavation of the line and that a 20 foot right of way is justified, then the issue of extinguishment must be addressed. Northwest claims the defendants' encroaching structures materially interferes with its easement rights because it can't respond quickly in an emergency and it can't excavate the pipeline with the structural encroachments in place. Northwest ignores on appeal Churches and

Lunas contention that if their improvements are inappropriate encroachments on the right of way which unreasonably interfere with Northwest's rights, the interference was irrespective of the Act and occurred when the encroachments were established.

If in fact the trial court is going to find these structural encroachments (shop, lean-to, house and shed) unreasonably burden and interfere with Northwest's easement rights, then it follows that they were inconsistent with the easement rights at the time they were placed in the right of way. Similarly, if the encroachments present safety risks, the risks were established concurrent with the erection of the structures. The alleged unreasonable burden to emergency excavation occurred at the time these items were erected in the right way.

Nonetheless, Northwest claims the trial court did not commit error in finding there was no extinguishment of the easement with respect to structures because it has not yet had occasion to excavate this *particular* portion of the pipeline, even though the trial testimony established that it has excavated the pipeline to perform maintenance in many other areas along the pipeline corridor to perform maintenance. Because of this fact, Northwest claims that it did not need to use that portion of its easement width necessary for excavation. Northwest concludes that Church and Luna therefore fail to meet the requirement of *Winn v. Eaton,* 128 Idaho 670, 917 P.2d 1310 (Ct. App. 1996) of showing that the use of the easement by the servient estate is wholly inconsistent with the easement holders use.

Northwest correctly relates the *Winn's* holding that the servient tenement may plant trees, erect a fence, etc. and such will not be deemed to be adverse, until such time as (1) the need for the right way arises, (2) a demand is made by the owner of the dominant estate that the easement be opened, and (3) the owner of the serviette estate refuses to do so. Adopting the logic of the trial court Northwest claims the need to excavate the pipeline has only recently had occasion to

use the easement, and therefore.

In its analysis, the *Winn* court recognized that the trial court below was balancing the ruling in *Shelton v. Boydstun Beach Ass'n,* 102 Idaho 818, 819, 641 P.2d 1005 (Ct. App. 1982) with the ruling in *Koulouch v. Kramer*, 120 Idaho 65,813 P.2d 876 (1991) in determining the issue.

In *Boydstun Beach Ass'n* there was an express easement which granted certain rights to the dominant estate, including boating, bathing, driving and parking. Shelton constructed a retaining wall, erected fences, and planted grass and flowers within a portion of the easement area. The remainder of the easement area was used, at least sporadically, by the easement holders. The trial court found these improvements were inconsistent with the express purposes of the easement allowing for boating, bathing, driving and parking, set forth in the grant of easement. Because the easement was being used, at least occasionally, the trial court held the easement was extinguished. This Court upheld the trial court's determination that there was an extinguishment of the easement because Shelton's use was inconsistent with the express purpose of the easement for beach use and had denied such use by the easement holders who were using the easement.

In *Koulouch*, the servient tenant had placed or caused to be placed in the easement a utility pole, a board fence, trees, a fence on one side of the easement, a concrete irrigation diversion on another side, and several large boulders at one end of the easement. However, the dominant estate had never used the easement or had reason to use it. Therefore, this Court upheld the trial court's determination that there was no extinguishment because the servient estate's use was not truly inconsistent with the easement holders' rights.

The present case is more akin to *Boydstun Beach* than *Koulouch.* The express terms of

the easement provided that Northwest had the right to construct, maintain, inspect, operate, protect, repair, replace, alter or remove a pipeline. In the same agreement, Grantors agreed not to "build, create or construct or to permit to be built, created or constructed any obstruction, building, engineering works, or other structure over *or* that would interfere with said pipeline or lines or Grantee's rights hereunder." Northwest's position is that the structures, fences and trees must be removed because they do interfere with Northwest's right to maintain, inspect and repair the pipeline.

Northwest has been using the easement since the installation of the pipeline in the late 1950's. It is beyond cavil that their use has been more than sporadic.

Further, even though Northwest has not excavated the pipeline in this particular area, it has testified that certain of the improvements were adverse to its interest. Mr. Grant testified that Northwest had a best practice guideline regarding permanent structures, trees and fences. No trees were allowed in the right of way. Fences were allowed to cross, but no fence posts were allowed within 4 feet of the pipeline and no permanent structures were allowed on the right of way. Vol. I, p. 66, L. 11-20. He testified fences were not allowed to run along the pipeline because it affects testing, surveys and digging up the pipelines. He indicated that posts within four feet that might be augered in could damage the pipeline. Vol. I, p. 79, L. 9-25; p. 80, L. 1-25; p. 81, L. 1-5. He testified trees disband the coating on the pipe. Vol. I, p. 73, L. 14-25; p. 74, L. 1-6. Trees 10 feet away don't present a root damage potential. Vol. I, p. 11-19. The tree distance of 10 feet is an internal policy originating from as long as Mr. Grant was with the company in 1973. Vol. I, p. 199, L.6-25, p. 200, L. 1-9. Thus, based upon Mr. Grant's testimony, the trees and fences have been viewed as an inconsistent use of the easement irrespective of pipeline excavation needs.

Additionally, Northwest had a policy to keep its easements clear. Northwest claimed anything within the width of the easement was an encroachment. Tr Vol. I, p. 255, L. 5-13. Northwest maintains if the servient landowner was going to use the easement area that they were required to talk to Northwest first. Tr Vol. I, p. 537, L. 5-9. Northwest does not allow any permanent structures in the right of way. Tr Vol. I, p. 573, L. 22-25; p. 574, L. 1-3. Northwest has a long established encroachment permit process. Tr Vol. I, p. 573, L. 10-25; p. 573, L. 10-21. On monitoring encroachments, Northwest has a form encroachment report for the field operator to fill out when there was an encroachment encountered, and it was standard policy for the operator to prepare the report. Defendant's Exhibit AA; Tr Vol. I, p. 213, L. 7-25; p. 214, L. 1-8; p. 206, L. 6-25.

Northwest knew this area had encroachment problems. When Mr. Grant became the manager in 1997, he was aware there were encroachments in the right of way. Tr Vol. I, p. 211, L. 10-23. Northwest had discussed the encroachments in Kellogg's Fourth Addition, but "for some reason through the years they had gone to where it shouldn't be." Tr Vol. I, p. 208, p. 209, L. 1-17.

Next, Northwest does not direct this Court to the fact that it demanded Church open the right of way up in 1999 when he built his shop. Church did not comply with the demand. *See* Plaintiff's Trial Exhibit 36-40. Thus, there was a demand to open the right of way in 1999 that was refused by Church and not enforced by Northwest.

Finally, the fact there has been no excavation on defendants' property to date is irrelevant. Northwest was regularly maintaining the pipeline in this corridor. It knew that such maintenance required excavation. It knew it couldn't work around the structures on the Church and Luna property with large equipment. It knew the fences and trees violated its established

internal policies. It knew it could not excavate in the case of an emergency because of the structures with footings and foundations. It knew Church disagreed with is position on the width of the right of way. Thus, the existence of the encroachments was wholly inconsistent with its rights under the express terms of the grant of easement.

Given the facts as stated earlier, this case is much more akin to the *Boydstun Beach* case than the *Koulouch* case. This is not an instance of improvements being installed by the servient estate during a period of non-use by the dominant estate. Rather, it is a case where the easement holder had specific rights under its grant and was aware of them. It regularly monitored its easements, required encroachment permits to place structures in its easement, had policies about fences and trees for the protection of its pipeline within the easement; and was aware there was an encroachment issue at the particular property. Thus, the trial court erred when it found that the use was not wholly inconsistent with Northwest's rights to repair, replace and maintain the existing pipeline.

Northwest also directs this Court to *Andrews v. Columbia Gas supra*, in support of position that there was no extinguishment of the easement. This case sheds no light on the issue of extinguishment. The law that was being applied was Ohio law. According to the case, when the width is indefinite on a grant of an easement, the Ohio courts consider acquiescence *at the time of the grant* to determine the scope of the easement intended by the parties. Later use is irrelevant under Ohio law to determining the original intent of the parties. This holding does not assist this Court on the issue of extinguishment.

This case also discussed estoppel. It noted that under Ohio law, a company's lack of action, standing alone, does not estop it from arguing that a certain width is reasonably necessary and convenient. Again, this holding from the Ohio court does not provide any useful guidance

on the issue of extinguishment under Idaho law.

What is instructive from the *Andrews* case is its discussion of the damage issue. The plaintiff sought damages for the trees that would be removed in the exercise of the dominant estate's maintenance rights. The trial court noted that the contract, which has very similar language to the agreement in the present case, allowed the gas company to exercise its right to maintain the easement, but only allowed for damages to crop and fences. Since the item damaged was not expressly included in the contract, the court declined to award damages.

In the present case, the contract provided that the Grantee would pay damages to growing crops, pasturage, timber, fences or buildings of the Grantors for any damages caused by Grantees exercise of its rights. If one is to follow Northwest's argument to its logical conclusion, it has never had a need to exercise its easement rights for maintenance until recently. If that truly is the case, the defendants' improvements were not impermissible encroachments because they were not interfering with the easement.

Thus, when Northwest determined recently that it wished to open the right of way to exercise its rights to inspect, maintain and repair its pipeline, it became obligated to pay defendants' damages to their fences, timber (trees), and buildings, which are enumerated in the contract and the trial court erred in ordering defendants to remove certain ones of them at their own expense.

III. Conclusion

Northwest urges that its business has a unique nature that should be considered when determining the scope of the relief to which it was entitled in this declaratory judgment act. However, like any other holder of an easement, it can't expand its easement rights merely

because it is regulated. Its easement rights are the same as any other easement holder.

RESPECTFULLY SUBMITTED this 4TH day of June, 2009.

JAMES, VERNON & WEEKS, P.A.

Susan P. Weeks

SUSAN P. WEEKS
Attorneys for Appellants/Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of June, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Todd Reuter
Preston Gates & Ellis, LLP
1200 Ironwood Dr., Ste. 315
Coeur d'Alene, ID 83814

☑ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy (FAX)

Susan P. Weeks